UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1997/4
17 December 1996

ENGLISH
Original: ENGLISH/FRENCH/
SPANISH

COMMISSION ON HUMAN RIGHTS
Fifty-third session
Item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Working Group on Arbitrary Detention

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Introduction

1. The Working Group on arbitrary detention was established by the Commission on Human Rights at its forty-seventh session, in 1991, by resolution 1991/42. The Commission decided to set up a working group composed of five independent experts with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the international instruments adopted by the States concerned. The Working Group consists of the following five independent experts: Mr. L. Joinet (France), Chairman/Rapporteur; Mr. R. Garretón (Chile), Vice-Chairman; Mr. L. Kama (Senegal); Mr. K. Sibal (India) and Mr. P. Uhl (Slovakia). The Group has so far submitted five reports to the Commission, covering the period 1992-1996 (E/CN.4/1992/20, E/CN.4/1993/24, E/CN.4/1994/27, E/CN.4/1995/31 and Add.1-4, and E/CN.4/1996/40 and Add.1. The Working Group's initial three-year mandate was extended by the Commission in 1994 for a further three years.

2. At its fifty-second session, the Commission adopted resolution 1996/28, entitled "Question of arbitrary detention", in which, inter alia, it requested the Working Group to submit a report to the Commission at its fifty-third session and to make any suggestions and recommendations which would enable it to discharge its task in the best possible way, in cooperation with Governments, and to continue its consultations to that end within the framework of its terms of reference.

I. ACTIVITIES OF THE WORKING GROUP

3. The present report covers the period from January to December 1996, during which the Working Group held its fifteenth, sixteenth and seventeenth sessions.

A. Discharge of the Group's mandate with regard to communications

1. Communications transmitted to Governments and currently being dealt with

4. During the period under review, the Working Group transmitted 30 communications concerning 205 new cases of alleged arbitrary detention (12 women and 193 men) involving the following countries (the number of cases for each country is given in parenthesis): Albania (4), Bahrain (59), Colombia (1), Ethiopia (1), France (1), Gambia (35), Indonesia (22), Israel (1), Kuwait (1), Lebanon (2), Malaysia (9), Morocco (11), Mexico (9), Nigeria (5), Peru (5), Republic of Korea (2), Russian Federation (1), Syrian Arab Republic (22), Tunisia (1), Turkey (2), United States of America (2), Venezuela (6), Viet Nam (1) and Zaire (2).

5. Out of the 24 Governments concerned, 12 provided information on all or some of the cases transmitted to them. They were the Governments of the following countries: Bahrain, Ethiopia, Indonesia, Kuwait, Lebanon, Peru, Republic of Korea, Russian Federation, Syrian Arab Republic, Turkey, Venezuela and Viet Nam.

6. Apart from the above-mentioned replies, certain Governments (Algeria, Cuba, Egypt, Indonesia, Peru, Turkey and Viet Nam) communicated information concerning cases on which the Group had already adopted decisions (see paras. 14 and 15 below).

7. The Governments of Albania, Colombia, Gambia, Israel and Nigeria did not provide the Working Group with any reply concerning the cases submitted to them, though the 90-day deadline had expired. With regard to the Governments of the other countries mentioned in paragraph 4 above (France, Malaysia, Morocco, Mexico, Tunisia and the United States of America), the 90-day deadline had not yet expired when the present report was adopted by the Group (6 December 1996).

8. In respect of communications transmitted prior to the period January-December 1995, the Working Group received replies from the Governments of Canada, China, Colombia and Turkey.

9. A description of the cases transmitted and the contents of the Governments' replies will be found in the relevant decisions adopted by the Working Group (see E/CN.4/1997/4/Add.1).

10. As regards the sources which reported alleged cases of arbitrary detention to the Working Group, it may be noted that of the 205 individual cases submitted by the Working Group to Governments during the period under consideration, 10 were based on information communicated by members of the families or relatives of the detained persons, 91 on information communicated by local or regional non-governmental organizations, and 104 on information provided by international non-governmental organizations enjoying consultative status with the Economic and Social Council.

2. Communications concerning which the Working Group adopted decisions

11. During the three sessions (its fifteenth, sixteenth and seventeenth) held in 1996, the Working Group adopted 49 decisions concerning 262 persons in 24 countries. Some details of the decisions adopted in 1996 appear in the table hereinunder and the complete text of decisions 1/1996 to 36/1996 is given in Addendum 1 to this report. Decisions 37/1996 to 49/1996 will be reproduced in an addendum to the Working Group's next report.

12. The Commission will, moreover, recall that in a spirit of cooperation the Working Group, at its fourteenth session modified its working methods by establishing, as a special measure, a procedure for review of its decisions (see annex I, para. 14.2). Apart from the decisions mentioned above, the Group considered at its fifteenth and sixteenth sessions three applications for review concerning Bhutan, Colombia and the Republic of Korea (see Addendum 1 to this report). These applications were submitted to the Working Group either by the Government (for Colombia and the Republic of Korea) or by the information source (for Bhutan).

13. In accordance with its methods of work (Annex I, paras. 2 and 14.1 (c)), the Working Group, in addressing its decisions to the Governments, drew their attention to the Commission's resolution 1996/28 inviting them to take note of

the Working Group's decisions and, where necessary, to take appropriate steps and to inform the Working Group of the steps they have taken. On the expiry of a three-week deadline the decisions were also transmitted to the source.

Decisions adopted in 1996 by the Working Group on Arbitrary Detention

Decision No.	Country	Government's reply	Person(s) concerned	Decision
1/1996	Sri Lanka	Yes	S. Sellathurai and 23 others*	Released - case filed
			K.H.G. Arachchige and 10 others*	Pending for further information
2/1996	Nigeria	No	Karanwi Meschack, Mitee Batom and Loolo Kekue	Arbitrary, categories II and III
3/1996	Viet Nam	Yes	Do Trung Hieu and Tran Ngoc Nghiem	Arbitrary, category II
4/1996	Morocco	No	Saaba Bent Ahmed and 4 others*	Arbitrary, category III
5/1996	Tunisia	Yes	Aicha Dhaouadi, Tourkia Hamadi, Mahfouhi Abderrazak and Najib Hosni	Not arbitrary
6/1996	Nigeria	No	General Olusegun Obasanjo and 22 others*	Arbitrary, categories II and III
7/1996	Zaire	No	Sylvestre Ningaba and Dominique Domero	Arbitrary, category I
			Déo Bugewgene	Released - case filed
8/1996	Cuba	No	Carmen Julia Arias Iglesias	Arbitrary, Category II
9/1996	Cuba	Yes	Orson Vila Santoyo	Released - case filed
10/1996	Pakistan	No	Habibullah and 5 others*	Arbitrary, Category II
11/1996	Azerbaijan	Yes	Malik Bayramov and Asgar Ahmed	Released - cases filed

Decision No.	Country	Government's reply	Person(s) concerned	Decision
12/1996	Turkey	No	Atilay Aycin, Eren Keskin and Ekber Kaya	Arbitrary, category II
13/1996	Sudan	Yes	Tebira Indris Habani and 6 others*	Released - cases filed
			Abdel Rasoul Al-Nour and 18 others*	Arbitrary, categories II and III
14/1996	Islamic Republic of Iran	No	Ali-Akbar Saidi-Sirjani and Said Kiazi Karmani	Arbitrary, category II
			Abbas Amir-Entezam	Arbitrary, category III
15/1996	Peru	Yes	Walter Ledesma Rebaza and Luis Mellet	Released - cases filed
16/1996	Israel	No	Ghassan Attamleh	Pending for further information
17/1996	Israel	No	Wissam Rafeedie and Majid Ismail Al-Talahmeh	Arbitrary, category III
18/1996	Israel	No	Ali Jaradat and Muhammad Rajoub	Arbitrary, category III
			Abdel Raziq Yassin Farraj	Released - case filed
19/1996	People's Republic of China	Yes	Jiang Qisheng and Wang Zhongqiu	Pending for further information
			Zhang Lin	Arbitrary, category III
			Bao Ge	Arbitrary, categories II and III
20/1996	Albania	No	Sulejman Rahman Mekollari and 3 others*	Arbitrary, category II

Decision No.	Country	Government's reply	Person(s) concerned	Decision
21/1996	Bahrain	Yes	Hassan Ali Fadhel, Issa Saleh Issa and Ahmad Abdullah Fadhel	Arbitrary, category II
22/1996	Bahrain	Yes	Sadeq Abdullah Ebrahim and 10 others*	Arbitrary, category II
23/1996	Bahrain	Yes	Sheïkh Abd al-Amir al-Jamri and 8 others*	Arbitrary, category III
24/1996	Israel	No	Othman Abdul-Mahdi	Arbitrary, category III
25/1996	Republic of Korea	Yes	Kwon Young-kil	Released - case filed
			Yang Kyu-hun	Arbitrary, category II
26/1996	Venezuela	Yes	Carlos José Gonzalez and 5 others*	Released - cases filed
27/1996	Turkey	Yes	Ibrahim Sahin	Released - cases filed
28/1996	Turkey	Yes	Ibrahim Aksoy	Arbitrary, category III
29/1996	Syrian Arab Republic	No	Usama Ashur al-Askari and 10 others*	Arbitrary, category II
30/1996	Syrian Arab Republic	No	Mazim Shamsin	Arbitrary, category II
			Firas Yunis	Arbitrary, categories II and III
31/1996	Syrian Arab Republic	No	Mustafa el-Hussain and 7 others*	Arbitrary, categories II and III
32/1996	Colombia	No	Gilardo Arias Valencia	Arbitrary, category III

Decision No.	Country	Government's reply	Person(s) concerned	Decision
33/1996	Peru	Yes	Cesar Augusto Sosa Silupu	Pending for further information
34/1996	Peru	Yes	Margarita Chuquiure Silva	Pending for further information
35/1996	Peru	Yes	Mercedes Milagros Nuñez Chipana	Released - cases filed
36/1996	Indonesia	Yes	Jose Antonio Neves	Arbitrary, category II
			Isaac Soares and 6 others*	Released - cases filed
			Octaviano and 3 others*	Not detained - cases filed
			Francisco Miranda Branco	Pending for further information
37/1996	Nigeria	No	Annimo Bassey and 2 others*	Arbitrary, categories II and III
38/1996	Nigeria	No	George Mbah and Mohammed Suleh	Arbitrary, categories II and III
39/1996	Morocco	No	Andala Cheikh Abilil and 10 others*	Arbitrary, category II
40/1996	Gambia	No	Jobarteh Manneh and 34 others*	Arbitrary, category I
41/1996	Lebanon	Yes	Ziad Abi-Saleh and Jean Pierre Daccache	Not arbitrary
42/1996	Indonesia	Yes	Tri Agus Susanto Siswowihardjo	Arbitrary, category II
43/1996	Peru	Yes	Sybila Arrendondo Guevarra	Pending for further informtion
44/1996	Colombia	Yes	Jorge Luis Ramos and 4 others*	Released - cases filed

Decision No.	Country	Government's reply	Person(s) concerned	Decision
45/1996	Peru	Yes	Lori Berenson	Pending for further information
46/1996	Peru	Yes	Maria Elena Loayza Tamayo	Pending for further information
47/1996	Peru	Yes	Fresia Calderón Gargate	Released - case filed
48/1996	Peru	Yes	Jesús Alfonso Castiglione Mendoza	Released - case filed
49/1996	Peru	Yes	Alicia Huaman Morales	Released - case filed

* The complete list of the persons concerned is available for consultation at the secretariat of the Working Group.

Applications for review submitted to the Working Group on Arbitrary Detention in 1996

Review application	Country	Application for review submitted by:	Person(s) concerned	Decision
No. 1	Colombia	Government	Gerardo Bermudez Sanchez	Application rejected
No. 2	Republic of Korea	Government	Lee Jang-hyong and Kim Sun-myung	Application rejected
No. 3	Bhutan	Source	Tek Nath Rizal	Application partially accepted

3. Governments' reactions to decisions

14. The Working Group received information from a number of Governments following the transmittal of its decisions with regard to the cases reported in their countries. The Governments concerned were those of the following countries (the decision to which the information refers is given in parenthesis): Algeria (6/1995), Bahrain (35/1995, 21/1996, 22/1996 and 23/1996), Cuba (8/1996), Egypt (45/1995), Indonesia (18/1995), Peru (12/1995,

13/1995, 17/1995, 22/1995, 24/1995, 26/1995, 42/1995 and 43/1995), Turkey (34/1995, 40/1995 and 12/1996) and Viet Nam (3/1996).

15. Governments informed the Working Group of the release of the following persons: Algeria (15 persons concerned, decision 6/1995), Bahrain (3 minors concerned by decision 21/1996; as regards decisions 22/1996 and 23/1996, the Government states that the four persons concerned have never been detained. With regard to decision 35/1995, only 14 persons remain under detention), Cuba (Carmen Julia Arias Iglesias, 8/1996), Egypt (Mohammed Abd El Raziq Ahamad Ali, 45/1995), Indonesia (Maiyasak Johan, Parlin Maniburuk and Jannes Butahaen, 18/1995), Peru (Fresia Calderón Gargate, 12/1995, Carrillo Antayhua, 13/1995, Abad Aguilar Rivas and Edilberto Rivas Rojas, 17/1995, Jesús Alfonso Castiglione Mendoza, 22/1995; and Luis Rolo Huaman Morales, 42/1995), Turkey (Ahmet Turk and Sedat Yurttas, 40/1995, and Eren Keskin and Atilay Aycin, 12/1996); and Viet Nam (Tran Ngoc Nghiem (Hoang Minh Chinh), 3/1996).

16. The Working Group welcomes the release of the persons whose detention it had declared to be arbitrary and thanked the Governments for taking account of its recommendations, particularly concerning respect for the principles and standards laid down in the relevant international instruments. The Working Group would like to reiterate its thanks to the above-mentioned Governments and, in accordance with the Commission's wish, to encourage the other Governments to take similar measures.

4. Communications that gave rise to urgent appeals

17. During the period under review the Working Group transmitted 75 urgent appeals to 35 Governments and to the Palestinian Authority (the number of persons concerned by these appeals is given in parenthesis). Six appeals were addressed to the Nigerian Government (44); four to the Governments of India (800), Sudan (42), Tunisia (4) and Turkey (6); three to the Governments of Bahrain (14), Ethiopia (3), Indonesia (166), Morocco (11), and Viet Nam (6), and to the Palestinian authority (3); two to the Governments of Algeria (2), Bangladesh (2), China (2), Colombia (3), the Congo (2), Cuba (2), Haiti (21), Israel (2), Kenya (22) and Rwanda (2); and one each to the Governments of the following States: Bhutan (1), Bolivia (1), Brazil (4), Cameroon (1), Chile (1), Federal Republic of Yugoslavia (6), France (about 200 persons), Georgia (2), Lebanon (1), Nepal (14), Peru (1), Sierra Leone (4), Syrian Arab Republic (1), United Arab Emirates (1), and Venezuela (2).

18. Of the above-mentioned messages, eight were urgent appeals put out jointly by the Working Group with other thematic special rapporteurs and/or by countries. These were addressed to the Governments of Bolivia, China, Indonesia, Nigeria, the Federal Republic of Yugoslavia, Sudan and Viet Nam.

19. In conformity with paragraph 11 (a) of its revised methods of work (see annex I), the Working Group, without in any way prejudging the final assessment of whether the detention was arbitrary or not, drew the attention of each of the Governments concerned to the specific case as reported and appealed to it to take the necessary measures to ensure that the detained persons' right to life and to physical integrity was respected. When the appeal made reference, in accordance with the source, to the critical state of health of certain persons or to particular circumstances such as failure to

execute a court order for release, the Working Group also requested the Government concerned to undertake all necessary measures to have them released without delay.

20. In two cases the Working Group had recourse, as it had been recommended to do by the Commission on Human Rights in resolution 1993/36 (para. 4), to its power to take up cases on its own initiative, addressing appeals to the French Government 1/ and the Chilean Government. 2/ In the case of France, the Working Group put out an urgent appeal concerning the stopping for questioning and placing under administrative detention of about 200 persons. Many of them were aliens of whom a large percentage, more particularly of African origin, were in breach of the legislation on aliens entering and staying in France. The Government's detailed reply and the information obtained by the Working Group make it clear that the persons concerned have utilized the legal remedies provided for. Most of them were released by court order shortly after being detained, and a few of them were escorted to the frontier. In the case of Chile, the Working Group requested the Government to uphold the right to physical integrity of a leading female member of the Chilean Communist Party who, according to information later obtained by the Group, was released again shortly after being detained.

21. The Working Group received replies to the urgent appeals addressed to the Governments of the following countries: Algeria, Bahrain, Bhutan, Brazil, China, Colombia, Ethiopia, India, Indonesia, Israel, Kenya, Morocco, Nepal, Nigeria, Peru, Rwanda, Tunisia, Turkey and Viet Nam, and to the Palestine Authority. In some cases it was informed, either by the Government or by the source, that the persons concerned had been released, in particular in the following countries: Algeria, Bahrain, Bhutan, Brazil, China, Colombia, Ethiopia, India, Kenya, Morocco, Nepal, Peru, Tunisia, Turkey and Viet Nam, and in the case of the Palestine Authority. The Working Group wishes to thank those Governments which heeded its appeal and took the necessary steps to provide it with information on the situation of the persons concerned, and especially the Governments which released those persons.

B. Discharge of the mandate as regards missions to the countries

22. During the period under consideration, the Working Group made visits to Bhutan, China and Nepal. While in Nepal, it went to the east of the country to visit the Bhutanese refugee camps set up in that region. Reports on the visits to China and to the refugee camps will be found in paragraphs 23 to 35 and 36 to 40 respectively. The visits to Bhutan and to Nepal are the subjects of Addenda 2 and 3.

Visit to the People's Republic of China

23. The Chairman-Rapporteur, Mr. Louis Joinet, accompanied by the Secretary of the Working Group, made a preparatory visit to the country on the invitation of the Government, from 14 to 21 July 1996.

Purpose of the visit

24. It had been agreed, in the preliminary exchanges of views, that the Working Group's visit could with advantage be preceded by a preparatory visit

so that, firstly, the Group could more easily take cognizance of certain constraints, political or technical (for example the problem of distances), facing such a visit and to have a better understanding of Chinese law, in particular with regard to the difficulties entailed in bringing it into conformity with the international instruments on human rights. Secondly, the Chinese authorities and experts would thereby be better able to appreciate the constraints to which the Working Group is subject, by the nature of its mandate, when it undertakes such visits.

Contacts made with the authorities and with professional groups

25. A first interview with Mr. Tian Zengpei, First Vice-Minister of Foreign Affairs, enabled the specific arrangements for and priority objectives of the visit to be determined. That audience was followed by talks with directors or section heads of the Ministries of Foreign Affairs, Justice and Public Security, assisted by their staff. During the trip to the provinces, the delegation met the Vice-Governor of the Province of Shandong. On their return to Beijing they visited by invitation the Supreme People's Court and the Supreme People's Prosecution Service.

26. At a fruitful meeting with the National Association of Lawyers, the delegation was able to appreciate the far-reaching change brought about by the recent reform abolishing the status of civil servant to which lawyers were compulsorily assigned. Henceforth they will be able to practice, as members of a liberal profession, in private chambers. The delegation also met the Vice-President of the "China Society for Human Rights Studies" and then, at its request, two professors of law, Mr. Chen Guang Zhong and Mrs. Xiong Qiu Hong, who gave the delegation a clearer understanding of the implications of the proposals finally opted for in the reform of the Code of Criminal Procedure recently adopted and due to come into force on 1 January 1997.

27. The talks with the Ministry of Foreign Affairs dealt mainly with the visit that was taking place and the preparations for the planned official visit. Most of the other work meetings were devoted to presentations on institutions and on Chinese legislation and to discussions on the content and significance of the current reforms, the most important of which concern criminal procedure, administrative procedure, and the status of judges, prosecutors and lawyers.

28. Most of these talks were held with the intention, on both sides, of helping to attain the above-stated purpose of the visit. While there was sometimes undeniable tension during contacts with certain local officials who had difficulty in understanding why United Nations representatives should be looking into their detention facilities, this difficulty was gradually overcome, without the visit itself being compromised, after explanations had been given and the residual misgivings removed.

Current reforms and their significance

29. According to the information garnered by the delegation, the most significant advances relate to the following reforms adopted by Parliament during 1996.

"Shelter and investigation", whereby the police could detain a person for 30 days without any supervision, has been abolished. The Working Group welcomes the repeal of this legislation, which the Commission on Human Rights will recall had led the Group to declare arbitrary many cases submitted to it where this purely administrative form of detention had been applied.

Any detention by the police will have to be authorized by the Prosecutor's Office and take place under its supervision for specified, relatively short maximum periods.

The lawyer, who was previously not allowed to see the detained person and his case file until seven days before the hearing, will henceforth be admitted as soon as the client is in police custody.

The police will no longer have direct power to drop proceedings and close the case; in future this will be done under the supervision of the Prosecutor's Office.

Remand in bail under financial guarantee is instituted.

As stated above, the provisions that made lawyers State officials are abolished. They will be able to practice in private chambers and, when the State has to provide aid (in low income areas), this will be payable only in the form of a supplementary grant and not of a salary, which would imply a subordinate relationship. The supervision of the profession, formerly exercised directly by the Ministry of Justice, will henceforth be entrusted to the National Association of Lawyers, with the State playing only an indirect role.

Under the reformed rules for conduct of hearings the President's monopoly of the right to direct the proceedings will be reduced in favour of a more adversarial debate between Prosecutor and advocate; the latter will now be able to present evidence and testimonies not yet entered in the file during the investigation phase.

30. Consideration of the changes resulting from these major reforms will of course be in the forefront of the Working Group's concerns during the visit planned for later.

Visit to prisons and centres for re-education through labour

31. During the exchanges of views prior to the preparatory visit, the Working Group had expressed the hope that it could be conducted according to the following plan:

Visit to a prison for convicted persons and a camp for re-education through labour (i.e. a camp for persons detained by administrative, not judicial decision) not listed among the establishments usually shown to foreign delegations;

Detained persons for questioning and place of interview to be chosen by the delegation;

Prisoners to be interviewed in the presence of the delegation alone.

32. As described below, it was according to this plan, finally approved by common consent, that the visits were conducted. As regards the choice of penal establishments to be visited, since the Beijing prison (convicted persons) and the centre for re-education through labour (administrative internment) at Zibo (Shandong province), proposed by the authorities, were not listed among those usually open for visits by foreign observers, the delegation accepted that proposal.

33. The first visit (Beijing prison for convicted persons) provided a test of the difficulties such a proceeding could pose, especially with those in charge of the penal establishments concerned - for there was no precedent - and an opportunity to find agreed solutions with a view to the ensuing visit to the Zibo centre for re-education through labour. Thanks to the experience thus acquired, this second visit went off well. In that connection, the Working Group would like to thank the Director-General, Department of International Organizations and Conferences, who had made a point of going already on the previous day to Zibo to facilitate the cooperation of the local authorities. The last interviews were able to take place according to the arrangements desired by the delegation (choice of detained persons and of place of interview, without witnesses and in the presence only of the United Nations interpreter).

34. In conclusion, the Working Group would like to bring to the attention of the Commission on Human Rights the following brief comments:

The Group considers it very important that, after the modernization of its productive system, the People's Republic of China should undertake the modernization of its legislative system, inter alia in the sphere of criminal procedure, which is very directly relevant to questions of detention and to the protection of human rights.

The Working Group thanks the Chinese authorities for having allowed the wishes expressed by the delegation to be taken into account, especially with regard to the possibility of having interviews with prisoners without witnesses or assigned locations. This touches on a matter of principle. The possibility of having such interviews gave the visit - both for the Chinese authorities and for the Working Group - mutual credibility. Thus the Working Group found that answers to certain questions left pending before the visit in order to leave enough flexibility for adaptation to local realities could be worked out case by case, on the spot.

The Working Group will be sure to take into account the experience acquired during this preparatory visit so as to ensure optimum conditions for the success of the later visit, which it proposed to defer until July 1997 in order to allow the recently adopted reforms - most of which will come into force on 1 January 1997 - to have produced their initial effects and the Working Group to report thereon to the Commission on Human Rights.

35. In view of the Working Group's projected visit to China in 1997 and the fact that consultations with the Chinese authorities to finalize the modalities of the visit are at an advanced stage, the Working Group believes, pending formal confirmation of the projected visit by the Chinese authorities before the end of the fifty-third session of the Commission, that it would be appropriate to defer all deliberations regarding communications received by the Working Group. In the event that the expected formal confirmation is not received, the Working Group will forthwith deliberate on all pending matters. If, however, the formal confirmation is received, all pending matters will be further deferred until after the visit, during which more information could be gathered through contacts and consultations.

Visit to Bhutanese refugee camps (Nepal)

36. In the course of its follow-up visit to Bhutan (see E/CN.4/1997/4/Add.3), and to gain a clearer understanding of the problem of nationals or residents of Nepalese origin who, from 1990 onwards, have been leaving Bhutan and most of whom have settled in refugee camps in eastern Nepal, the Working Group visited the districts of Morang and Jhapa, on the frontier with India, from 26 to 28 April 1996. On 26 April, in Damak, the Working Group had talks with refugees who had previously been detained in Bhutan. They told the group of their personal experiences and the circumstances in which they had had to leave Bhutan, very often with their families.

37. On 27 April the Working Group visited one of the largest Bhutanese refugee camps, the Goldhap camp (some 8,000 inmates), where it interviewed some of those in charge and then some inmates, who in certain cases had been detained in Bhutan. The Group also went to the bridge at Kakarbitta, the crossing place between India and Nepal by which the Bhutanese refugees enter. In addition, the Group gave an interview in the town of Birtamod to two Indian lawyers representing a large number of Bhutanese refugees who were then under arrest in India ("Peace marchers"). An urgent appeal was addressed to the Indian authorities on that subject.

38. Throughout its stay in the east of Nepal, the Group benefited from the particularly effective aid (accommodation, logistics and interpretation) of the Office of the United Nations High Commissioner for Refugees (HCR), to which it would like to render very special thanks.

39. On the conclusion of this short visit, the delegation:

(a) Firstly, noted that the refugee camps were open and that consequently the hypothesis of arbitrary deprivations of liberty could be ruled out;

(b) Secondly, thanked the Nepalese authorities, who, not being directly concerned by the situation of the refugees in the camps, of whom HCR and international NGOs take charge, in no way intervened in the conduct of the visit.

40. Finally, the Working Group earnestly trusts that the current negotiations between Bhutan and Nepal will quickly lead to an agreement whereby the ordeal undergone by the Bhutanese refugees can be brought to an end.

Visit to Bhutan

41. See Addendum 3 for report on this mission.

Visit to Nepal

42. For report on this mission, see Addendum 2.

Visit to Peru

43. On the occasion of the fifty-second session of the Commission on Human Rights the Peruvian Government invited the Working Group to make a visit to the country. This visit could not take place in 1996, but is scheduled for January 1997 (for mission report see Addendum 4).

C. Cooperation with the Commission on Human Rights

44. In addition to studying questions concerning the scope of the Group's mandate, which the Commission asked it to consider and to which the second part of this report will be devoted, the Working Group again continued this year to accord particular attention to the Commission's other resolutions having to do with the Group's mandate, and more generally the mandate on thematic procedures. This concerns, in particular, resolutions 1996/46 (Human rights and thematic procedures), 1996/47 (Human rights and terrorism), 1996/48 (Question of integrating the human rights of women throughout the United Nations system), 1996/49 (The elimination of violence against women), 1996/51 (Human rights and mass exoduses), 1996/53 (Right to freedom of opinion and expression), 1996/55 (Advisory services, technical cooperation and the Voluntary Fund for Technical Cooperation in the Field of Human Rights), 1996/62 (Hostage-taking), 1996/69 (Human rights in Cuba), 1996/70 (Cooperation with representatives of United Nations human rights bodies), 1996/78 (Comprehensive implementation of and follow-up to the Vienna Declaration and Programme of Action), 1996/79 (Situation of human rights in Nigeria), and 1996/85 (Rights of the child).

D. Cooperation with Governments and non-governmental organizations

45. In order to be better able to respond to the Commission's invitation to present to it conclusions and recommendations on the scope of the Working Group's mandate, the latter undertook the following consultations.

46. During its fifteenth session, the Group had talks with a number of NGOs including Amnesty International (AI), the World Organization against Torture, the Association for the Prevention of Torture and the International Service for Human Rights, together with the International Commission of Jurists (ICJ) and the International Federation of Human Rights (FIDH), which submitted to it two high-level contributions.

47. During its sixteenth session the Group had consultations with the representatives of the delegations that co-sponsored resolution 1996/28 and

with the Chairman of the Commission on Human Rights. The Group also decided to get into touch, in due course, with the coordinators of the regional groups.

II. STUDY OF QUESTIONS RELATING TO THE SCOPE OF THE GROUP'S MANDATE WHICH THE COMMISSION ON HUMAN RIGHTS ASKED IT TO EXAMINE

48. In its resolution 1996/28 the Commission on Human Rights requested the Working Group, firstly, to apply the treaties relevant to the case under consideration only to the States which are parties to them and, secondly, to take duly into consideration the distinction between detention and imprisonment made, inter alia, by General Assembly resolution 43/173 of 9 December 1988, and to submit to the Commission, at its fifty-third session, its conclusions and recommendations on this question. That is the subject of the present chapter, which will be entirely devoted to this question.

A. Applicability of provisions of conventions on human rights to States that are not party to them

49. Pursuant to the aforementioned resolution 1996/28, the Working Group has, since its fifteenth session, in May 1996, in compliance with the Commission's instructions, ceased to apply the International Covenant on Civil and Political Rights to those States which are not parties to it.

B. Interpretation of the term "detention" in relation to the scope of the Working Group's mandate 3/

50. The real issue that requires consideration relates to the true meaning of the term "detention" in the context of the mandate of the Working Group. The specific question is whether the distinction between detention and imprisonment made in the context of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173) exists in all applicable international instruments with reference to which the Working Group is required by Commission on Human Rights resolution 1996/28 to carry out its mandate. Whether such a distinction is at all valid is to be considered, keeping in mind the purpose for which the Working Group was established and the objectives which it considers appropriate and necessary for discharging its functions.

51. As the Commission is aware, since it was set up in 1991 the Working Group has applied itself to studying its mandate (see E/CN.4/1992/20, paras. 12 and 13 and annex I and E/CN.4/1993/24, deliberations 02 and 03) and to defining its methods of work (comments annexed to all the reports submitted by the Group to the Commission).

52. Aware of the importance of the question which, over and above its relevance to the Working Group as such, might concern all special procedures by themes, the Group has since then gone deeper into it and submits the following clarifications for the Commission's consideration.

1. Grounds deriving from the analysis of the Group's mandate

53. The Group is convinced that it was not the Commission's intention to restrict only to pre-trial situations the protection and promotion of every person's right not to be arbitrarily deprived of freedom.

54. According to the Working Group's understanding, what mattered to the Commission in the expression "arbitrary detention" was essentially the word "arbitrary", i.e. the elimination, in all its forms, of arbitrariness, whatever might be the phase of deprivation of liberty concerned. Were that not the case, would it not lead to acceptance of a questionable form of selectivity?

55. The Working Group considered, moreover, that such an approach would entail a serious risk: that of implicitly legitimating - by an a contrario interpretation - the argument that deprivation of liberty such as could result from a sentence passed in the absence of any guarantee would not be prohibited by the international instruments referred to in the resolution establishing the Group.

56. This is still clearer if we take account of the fact that in the third paragraph of the preamble to the resolution that created the Working Group express reference is made to article 10 of the Universal Declaration of Human Rights which sets out the legal guarantees. The reference to that principle would make no sense if the Commission thought that detentions imposed in pursuance of sentences pronounced by courts that were not independent or impartial, and which had not heard the accused or not done so publicly, are not arbitrary detentions.

57. Furthermore, the Group clearly specified, addressing itself to the Commission, in the "Principles applicable in the consideration of cases submitted to the Working Group" (E/CN.4/1992/20, annex I) that it is only where non-observance of the right to a fair trial is grave (see the above-cited article 10 of the Universal Declaration of Human Rights) that it confers on the deprivation of freedom an arbitrary character.

58. It would be idle to maintain that infringements of human rights committed in the sphere of deprivation of freedom could be the act only of organs other than the judiciary, and that consequently the Commission has mandated the Group to inquire solely into infringements committed by organs of the executive or comparable bodies.

59. This argument would be in contradiction with one of the essential principles of international law, namely the unity of the State in the sphere of responsibility. It follows that in international law a State is responsible for the actions carried out by all its organs in the performance of their functions.

60. The International Law Commission has unequivocally reaffirmed this principle in article 6 of its draft articles on State responsibility, where it expressly stipulates that: "The conduct of an organ of State shall be

considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power." 4/

61. The regional human rights protection bodies have always shared that viewpoint, which is the only one compatible with international common law. The Commission, like the European Court of Human Rights, has never called in question this principle, 5/ any more than have the Inter-American Commission on Human Rights or Court of Human Rights. 6/

2. Arguments derived from the distinction between detention and imprisonment purportedly drawn by international instruments on human rights

62. The difficulty is that only the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (General Assembly resolution 43/173) draws this distinction, whereas either term is used in relevant texts accepted by the States to describe deprivation of liberty, whether pre-trial or post-trial.

63. It should be specified that the Group's mandate is not restricted to the Universal Declaration of Human Rights, any more than to the aforementioned Body of Principles. It applies to all "the relevant international legal instruments accepted by the States concerned", including those of a conventional nature and others, such as resolutions of the General Assembly or the Economic and Social Council.

64. Among these texts, however, the Group considered only those adopted by consensus.

(a) Relevant international legal instruments accepted by States that use the terms "detention" and "imprisonment" synonymously, without giving them different legal meanings.

65. Article 9 of the Universal Declaration of Human Rights, in its English, French and Spanish versions, stipulates that "no one shall be subjected to arbitrary arrest, detention and exile". It is the expression "arbitrary" which is of significance. The protection sought to be carved out in the Declaration is against arbitrary arrest, arbitrary detention and arbitrary exile. The Declaration condemns arbitrariness in deprivation of liberty in all its forms.

66. If the term "detention" were to apply to pre-trial detention alone, then it would follow that the Declaration does not condemn arbitrary imprisonment pursuant to a trial of whatever nature. Such an interpretation is per se unacceptable. In fact the Declaration, in article 10, stipulates the entitlement in full equality of a fair and public hearing to everyone by an independent and impartial tribunal. This further confirms that the expression "detention" in article 9 refers to all situations, either pre-trial or post-trial.

(b) Relevant international legal instruments accepted by States that use the term "detention" to refer to persons deprived of their liberty as a result of a conviction.

(i) Standard Minimum Rules for the Treatment of Prisoners

67. Although paragraph 63 (3) on "Rules applicable to special categories" stipulates that, in open institutions, "el número de detenidos deberá ser lo más reducido posible" ("the number of prisoners should be as small as possible"), 7/ section A in which this paragraph appears is entitled "Prisoners under sentence".

(ii) United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

68. Paragraph 15 of section II ("Scope and Application of the Rules") is particularly significant, providing that sections I, II, IV and V of the Rules apply to "all detention facilities and institutional settings in which juveniles are detained", which in effect means "sentenced", since it also specifies that section III applies specifically to juveniles under arrest or awaiting trial. The criterion used is therefore the opposite of the one contained in resolution 43/173, 8/ although this instrument which was also adopted by the General Assembly, is subsequent (1990) to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

(iii) United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (General Assembly resolution 40/33 of 29 November 1985)

69. These Rules consistently use the term "detenido" (prisoner) to refer to convicted juveniles.

(c) Instruments which establish a specific distinction between the terms "detention" and "imprisonment" and give them different legal meanings.

70. The research carried out by the Working Group came to the following conclusion: the only international text that distinguishes between "detention" and "imprisonment" is the aforementioned Body of Principles.

71. All other texts, as will be seen below (see paras. 75-85) use the terms "detention" and imprisonment" as synonyms for deprivation of liberty, both pre-trial and post-trial.

72. The distinction is drawn in the preamble to the Body of Principles in the section entitled "Use of Terms":

"For the purposes of the Body of Principles:

(a) 'Arrest' means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) 'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence;

(c) 'Imprisoned person' means any person deprived of personal liberty as a result of conviction for an offence;

(d) 'Detention' means the condition of detained persons as defined above;

(e) 'Imprisonment' means the condition of imprisoned persons as defined above;

(f) The words 'a judicial or other authority' means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantee of competence, impartiality and independence."

73. It is clear from this text that the use of the terms has no general scope, as commonly thought, beyond the Body of Principles itself. Thus:

(i) First, the text states literally that the terms are to be used "for the purposes of the Body of Principles" and no other.

(ii) Secondly, the Body of Principles does not use the term "definitions" or anything similar, referring only to the "Use of terms", an expression that is considerably more restrictive than a definition. The Body of Principles does not "define" anything; it simply states that some terms will be "used" in the text with a particular meaning; it is intended more as a "guide" than a set of definitions with a general scope.

(iii) Thirdly, the expression "means" clearly indicates that the meaning given to the terms used does not have any general scope. To define is to fix, clearly, exactly and precisely, the meaning of a word or the nature of a thing.

To "mean" is much less specific: it is to interpret and not to define.

(iv) The merely utilitarian nature of the expression "for the purposes of the Body of Principles" is confirmed by the use which is to be made of the phrase "a judicial or other authority", which has absolutely nothing to do with the definition of a judicial authority ("juez" in the Spanish version) in constitutional or procedural law.

(v) The history of the Rules finally dispels any doubt, in so far as the Chairman of the Working Group establishd by the General Assembly in its decision 42/426, Tullio Treves (Italy), referred to the terms "arrest", "detention" and "imprisonment" with a view to ensuring that persons deprived of liberty, should enjoy the guarantees contained in the Body of Principles during the whole time they were deprived of liberty; that could be achieved in either of two ways: either constantly using two or

three of these terms, or giving simple definitions of the terms "arrest", "detention" and "imprisonment", strictly for the purposes of the Body of Principles.

74. It is true that some Penal Codes use the term "prisión" (imprisonment) as a synonym for "custodial penalty". It is also true, however, that the most frequently used and most appropriate terms for referring to that form of penalty are "military prison" ("presidio"), "lock-up" ("encierro") and "penitentiary" ("penitenciaría").

3. Analysis of the scope of the term "detention" in regional instruments

75. Article 5, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, after establishing everyone's right to liberty, stipulates that no one shall be deprived of his liberty "save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention ("detenido legalmente" in the Spanish version) of a person after conviction by a competent court". See also article 4, paragraph 3, regarding the term "detention".

76. The American Convention on Human Rights uses not the term "imprisonment" ("prisión"), but the terms "deprived of liberty" ("privado de libertad"), "detention" ("detención"), "arrest or imprisonment" ("detención o encarcelamiento"), "detained" ("detenido o retenido"), and "person deprived of his liberty" ("persona privada de libertad"). 9/

77. With regard to the subject matter of this report, it is worth recalling what happened at the time that text was considered (at the plenary session of the 1969 Special Inter-American Conference). The delegation of Panama requested that it should be placed on record that it understood the term "detención" (detention) to mean "privación de libertad" (deprivation of liberty), which is general in scope. 10/

78. Article 6 of the African Charter on Human and Peoples' Rights states that: "in particular, no one may be arbitrarily arrested or detained". Here too it is the term arbitrarily which is important. Although the African Charter does not mention imprisonment, it is doubtful whether it may be assumed that the authors of the Charter would have considered arbitrary imprisonment acceptable.

4. Analysis of the scope of the term "detention" in national legislation

79. From a study of national legislation it may be concluded that the terms "imprisonment" ("prisión"), "detention" ("detención") and others are used indiscriminately to refer to deprivation of liberty. For instance, the Constitutions of Nicaragua (art. 33) 11/ and Panama (art. 28) 12/ use the term "detention" ("detención") to refer specifically to the situation of convicted persons.

80. The Argentine Act No. 24,660 of 1996 on the enforcement of custodial penalties repeatedly uses the term "detention" ("detención") to refer to persons serving a sentence. 13/

81. In its section on the enforcement of criminal sentences, the French Code of Criminal Procedure repeatedly uses the term "detainee" ("détenu") to refer to convicted persons ("condamnés"). 14/

82. The term "detention" ("detención") is also used to refer to the situation of convicted persons in article 20 of Peruvian Decree-Law No. 25,475 of 1992, which punishes the offence of terrorism. 15/

83. In the constitutions and laws of the following countries, the term "imprisonment" ("prisión") is used to refer to prisoners awaiting trial:

Argentina: Chapters V and VI of the Code of Criminal Procedure; 16/

Brazil: articles LXI to LXVI (the terms employed in the Portuguese text are "*presos*" and "*prisão*"; 17/

Chile: article 19, No. 7; 18/

Guatemala: articles 6, 9, 10 and 13; 19/

Honduras: articles 92 and 93; 20/

Mexico: articles 18 and 19; 21/

Nicaragua: article 33, paragraph 5; 22/

Paraguay: article 19; 23/

Portugal: 1976, article 27; 24/

Dominican Republic: 1966, article 8; 25/

Uruguay: 1966, articles 15 and 17; 26/

Venezuela: 1961, article 60, No. 1. 27/

84. When considering communications, the Working Group also noted that Cuban legislation uses the term "prisión" (imprisonment) to refer to persons who have not been convicted. One example is Act No. 5, by which the Law on Criminal Procedure was promulgated and which was published in the "Gaceta oficial" of the Republic on 26 August 1977. The term is used about 18 times to refer to persons on trial who have not yet been convicted. 28/

85. This is probably why the Cuban Government - it should be pointed out - uses the terms "prisión" (imprisonment) and "detención" (detention) synonymously in its Note No. 378 of 16 October 1995, addressed to the Working Group, which uses the expression "durante su estancia en prisión anterior al juicio" (while in pre-trial detention) to describe the situation of detainee Francisco Chaviano, which had been reported to the Group.

C. Analysis of positions adopted by the Commission on Human Rights

86. One of the Working Group's first tasks was to consider its mandate, to establish the principles applicable to the consideration of cases and to devise its methods of work, in accordance with resolution 1991/42.

87. The principles applicable in the consideration of cases refer to three categories of arbitrary detention (see E/CN.4/1992/20, annex 1). The first category concerns cases in which the deprivation of freedom is arbitrary, as it manifestly cannot be linked to any legal basis which might justify it. The second category concerns cases of deprivation of freedom where the facts giving rise to the prosecution or conviction concern the exercise of the rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, such as freedom of opinion and of expression. The third category concerns cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom, of whatever kind, an arbitrary character. In order to assess the arbitrary character or otherwise of the deprivation of freedom, the following elements are deemed relevant:

Pre-trial situations (15 cases are mentioned concerning both judicial and administrative detention);

Pre-trial situations (4 cases relating to judicial detention only);

Post-trial imprisonment (referring to 5 cases, all concerning convicted persons).

These principles were accepted without objection by the Commission on Human Rights in its resolution 1992/28, adopted without a vote.

88. Later the Working Group approved its Deliberation 03, in which it considered the same subject, reaching the conclusion, on the basis of international human rights texts and the case-law of other United Nations bodies, that any limitation of the Group's mandate solely to cases of deprivation of liberty prior to a conviction "would respect neither the letter nor the spirit of ... resolution 1991/42", and it decided that "there was no necessity to review the provisions it had adopted relating to its methods of work" (E/CN.4/1993/24, Deliberation 03). The Commission, once again without a vote and "having heard the comments made during the forty-ninth session", adopted resolution 1993/36, in which, after expressing its appreciation to the Working Group on Arbitrary Detention for the way in which it carried out its task, and taking note with satisfaction of the report and thanking the experts for the rigour with which they had performed their task, took note of the "deliberations" adopted by the Working Group on issues of a general nature (see E/CN.4/1993/24, sect. II) with a view to achieving better prevention and to facilitating the consideration of future cases ... (paras. 1, 2 and 6).

89. In all its subsequent resolutions (1993/36, 1994/32, 1995/59 and 1996/28), all adopted without a vote, the Commission always approved the Working Group's reports, in which a majority of decisions refer to post-trial detentions. In resolution 1996/28, which is the one that gave rise to these

reflections, the Commission not only reiterates its reaffirmation of article 10 of the Universal Declaration, but also refers specifically to articles 14 to 22 of the International Covenant on Civil and Political Rights. Article 14 is a genuine Code of Criminal Procedure. There would be no point in the Commission's "recalling" those articles in the resolution on the Group's mandate if the latter was not considered applicable to cases of detention imposed arbitrarily in trials where those provisions had been violated.

D. Implications of limiting the Group's mandate to pre-trial detention only: historical background

90. The position adopted by the Working Group since its first report, which - as we pointed out - was approved by the Commission, was that such a limitation could cast doubts on its usefulness or even its credibility. A study of the decisions adopted by the Group between September 1992 and September 1996 leads to the conclusion that, of 202 decisions adopted, 110 (or 55 per cent) relate to cases of deprivation of liberty subsequent to a conviction.

91. As far as credibility is concerned, for instance, how could it be explained that, in the case of a person condemned to a heavy sentence, for having written an editorial or a book, by a special court after a secret trial in which the rights of the defence had not been respected and which was held only a very short time after the arrest of the defendant, the Working Group should express an opinion only concerning the very first days of pre-trial detention. That could not be, the Group felt, the intent of the sponsors of Commission on Human Rights resolution 1991/42.

92. To take another example, the Group would also not be able to consider the deprivation of liberty of a person who had previously been tried for the same offence or crime, and perhaps even found not guilty; or the detention of a person sentenced for an act which, at the time it was committed, did not constitute an offence, etc.

93. This approach would lead to the conclusion that historic deprivations of liberty based on show trials, even if conducted in accordance with national legislation, would have been outside the Group's mandate, if the Group had existed. The reference here is to the cases of many defenders of human rights, democrats, anti-colonialist or anti-fascist militants, whose trials moved international opinion, and even in some cases the Commission on Human Rights itself. Examples include:

The imprisonment of Alfred Dreyfus on Devil's Island (Guayana) in 1894, accused of treason and sentenced by a court martial on the basis of false documents, and which according to the Group's principles and working methods would now be considered arbitrary;

The case of Nelson Mandela, sentenced in 1964 to life imprisonment for offences that involved the legitimate exercise of rights provided for in the international human rights instruments, and following a trial in which due process was not guaranteed;

The case of Mahatma Gandhi, who was sentenced by a colonial court in India for the offence of incitement to civil disobedience, whereas the acts of which he was accused were no more than the legitimate exercise of the rights to freedom of opinion, expression, assembly and association;

The trials of Vaclav Havel, President of the Czech Republic, and Petr Uhl, a member of the Working Group, both sentenced by the Prague court to prison terms of four and a half and five years respectively, for legitimately exercising the right to freedom of expression and opinion as Charter 77 militants;

The detentions of thousands of Chilean patriots sentenced during the dictatorship of General Pinochet by so-called "wartime military tribunals" (although there was no war at the time), which did not observe even one principle of due process, simply because they called for respect for human rights.

94. Another case the Working Group could not have considered was that of the deprivation of liberty to which the President of the Republic of Cuba, Fidel Castro, prisoner No. 3859, and his 28 comrades, were sentenced on 16 October 1953 by the Special Court of Santiago de Cuba in case No. 37,053, in which the principles of independence and impartiality required by article 10 of the Universal Declaration of Human Rights were not respected. At most, the Working Group could have declared the detention from 1 August to 16 October 1953 to have been arbitrary, but not the detention following the sentence, which was for 15 years' imprisonment for the offence covered by article 148 of the Cuban Penal Code of the time, until their release as a result of an administrative measure on 15 May 1955. 29/

III. CONCLUSIONS AND RECOMMENDATIONS REQUESTED BY THE COMMISSION

95. Before giving its specific responses to the requests contained in paragraphs 4 and 5 of Commission on Human Rights resolution 1996/28, the Working Group, in conformity with paragraph 20 of that resolution, reiterates the totality of the conclusions included in its previous reports, and in particular its fifth report (E/CN.4/1996/40) on the following points: the causes of arbitrary detentions, steps that could be taken to prevent or reduce them; follow-up action on the Group's decisions; the release of persons who have been detained arbitrarily, especially those detained for many years; the lack of cooperation with governments; and cooperation with other mechanisms of the Commission.

A. Conclusions

96. With regard to the Commission's request in paragraph 4 of resolution 1996/28, the Working Group has reached the following conclusions:

1. The mandate contained in resolution 1991/42 to investigate "cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned" covers both administrative and

judicial detentions and, among the latter, those prior to, during and after trial. This is because practically all the relevant international instruments accepted by Member States of the United Nations, as well as the regional instruments for the protection of human rights and in many cases the domestic legislation of States, fail to make any substantive distinction between the terms "detention" and "imprisonment".

2. General Assembly resolution 43/173 seeks to make a terminological distinction between detention and imprisonment only as an aid to construction, solely for the purposes of the Body of Principles adopted therein. The text of that resolution neither seeks to nor can alter the meaning of detention in relevant international instruments.

3. Without a vote and for the past five years, the Commission on Human Rights has accepted this approach, as set out in the five successive reports of the Group.

4. At its fifteenth session, held in May 1996, the Working Group complied fully with resolution 1996/28, operative paragraph 5, in applying the treaties relevant to the case under consideration only to the States which are parties to them.

B. Recommendations

97. The Working Group therefore recommends that the Commission should renew the mandate which it assigned to the Group and which has been reiterated each year from 1992 to 1996, and that it should maintain the mandate assigned to it in resolution 1991/42, so that it may continue to consider any alleged arbitrary deprivation of liberty, regardless of whether or not it follows a conviction.

Notes

1/ In accordance with the Group's methods of work (para. 15) the French expert did not take part in the deliberations.

2/ In accordance with the Group's methods of work (para. 15) the Chilean expert did not take part in the deliberations.

3/ In the original Spanish text of this chapter, different terms are used to designate various forms of deprivation of freedom, but these terms do not necessarily have equivalents in the other official languages of the United Nations or correspond only to one and the same term in the Arabic, Chinese, English, French and Russian versions of the international instrument cited. To facilitate understanding of the text in [Arabic, Chinese, English, French and Russian], the Spanish term is therefore usually indicated between quotation marks or in parenthesis in the Arabic, Chinese, English, French and Russian versions.

4/ Yearbook of the International Law Commission 1980, vol. II, Part 2, pp. 30-34.

5/ Case of Foti and others, 10 December 1982, series A, No. 56, para. 63, and case of Zimmermann and Steiner, 13 July 1983, series A, No. 63, para. 32.

6/ Annual report of the Inter-American Commission, case 9647, United States; case 9635, Argentina (admissibility); case 10198 (Nicaragua); see also Advisory Opinion No. 2 of the Inter-American Court, 24 September 1982: "... modern human rights treaties ... are not multilateral treaties of the traditional type, concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations. (underlining added).

7/ Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Part II, Rules applicable to special categories, A. Prisoners under sentence (underlining added).

8/ United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, adopted by the General Assembly in resolution 45/113 of 14 December 1990.

9/ American Convention on Human Rights, article 7: Right to Personal Liberty:

"1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge ...

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court ...

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non-fulfilment of duties of support."

10/ Records of the 1969 Special Inter-American Conference, page 443 of the Spanish version.

11/ Constitution of Nicaragua, article 33: No one may be subjected to arbitrary arrest or imprisonment ("detención o "prisión arbitraria"), nor be deprived of his freedom, except for reasons determined by the law and in accordance with legal procedures.

3. Once a sentence has been served, no one shall be detained further after an order of release has been issued by the competent authority.

12/ Constitution of Panama, article 28: the prison system is based on the principles of security, rehabilitation and social protection. The application of any measures which are harmful to the physical, mental or moral integrity of detainees ("detenidos") is prohibited.

Detainees ("detenidos") shall be trained in occupations which will allow them to resettle freely in society.

Juvenile detainees ("detenidos") shall be subject to a special system of custody, protection and education.

13/ Argentine Act No. 24,660 on the enforcement of custodial penalties, article 33: Any convicted person ("condenado") over the age of 70 or suffering from an incurable illness in its terminal phase may serve his sentence under house arrest ("detención domiciliaria") ...;

Article 34: The executing officer or competent judge shall revoke the order of house arrest in the event that the convicted person should violate ... (in the same meaning, see arts. 35 and 39).

14/ Code of Criminal Procedure, article 712: In all cases where it appears necessary to hear a convicted person ("condamné") who is detained ("détenu") ... ;

Article 713-1: Whenever, in application of an international agreement, a person detained for the enforcement of a sentence passed by a foreign jurisdiction ...;

Article 713-2: Upon arrival on French soil, the convicted detainee ("le condamné détenu") is brought before the Public Prosecutor ... ;

See also: Code of Prison Administration, article D57, paragraph 5; D70-2, paragraph 1; 94, paragraphs 1 and 2.

15/ Peruvian Law No. 25475, article 20: Custodial penalties established in the present Decree-Law must be served in a maximum security prison, in continuous solitary confinement for the first year of detention ("detención").

16/ Code of Criminal Procedure of Argentina, Chapter V, Prosecution, article 310: When an initiating order is pronounced without pre-trial detention ("sin detención preventiva") ... ;

Chapter VI, Pre-trial Imprisonment, ("prisión preventiva") article 312: The judge shall order the pre-trial imprisonment of the accused on pronouncing the initiating order ... Sub-section: "Treatment of prisoners ("presos");

Article 313: "Except as provided in the following article, anyone subject to pre-trial imprisonment ("prisión preventiva") ..."

The subsection "house arrest" has only one article, No. 314, which states that "the judge shall order house arrest ("detención domiciliaria") for persons to whom it may apply in accordance with the Criminal Code, who shall serve their sentence of imprisonment ("pena de prisión") at home".

17/ Brazilian Constitution, article 5, LXI, no one shall be detained except on the grounds of flagrante delicto or by written, founded order by the competent judicial authority, except in cases of military contravention or offence, as defined by law.

LXII: the imprisonment of any person and the place where that person is located shall be communicated immediately to the judge and to the family of the prisoner or to the person indicated by the latter.

LXV: any person who has been illegally imprisoned shall be immediately released by the judicial authority.

18/ Chilean Constitution, article 19: The Constitution ensures for all persons: (7) the right to personal liberty and safety. In consequence whereof:

(d) No one may be arrested or detained ("arrestado o detenido"), subjected to pre-trial detention ("prisión preventiva") or imprisoned, ("preso") except at home or in public places intended for that purpose. Prison authorities may not admit anyone there who is arrested or detained ("detenido"), accused ("procesado") or imprisoned ("preso"), without placing the corresponding order on record ...;

(e) The person shall be released on bail unless the detention or pre-trial detention ("prisón preventiva") is considered by the judge to be necessary ...

19/ Constitution of Guatemala, article 6: legal detention ("detención legal"). No person may be detained or imprisoned ("presa"), except for an offence or misdemeanour and by virtue of an order delivered in accordance with the law by a competent judicial authority. This does not include cases of flagrancy. Detainees must be made available to the competent judicial

authority within a period not exceeding six hours, and may not be placed under any other authority.

Article 9: Interrogation of detainees or prisoners ("presos"). Only the judicial authorities are competent to interrogate detainees or prisoners ("presos"). Such interrogation should take place within a period not exceeding 24 hours.

Article 10: Legal detention centre. Persons apprehended by the authority may not be taken to places of detention, arrest or imprisonment ("prisión") other than those legally and publicly intended for that purpose. Centres of detention, arrest or imprisonment other than those legally and publicly intended for that purpose. Centres of pre-trial detention, arrest or imprisonment shall not be the same as those where sentences are served.

Article 13: motives for a detention order ("auto de prisión"). No detention order may be pronounced. No detention order may be pronounced, unless there is information to the effect that an offence has been committed and unless there are sufficient rational motives for believing that the detained person ("persona detenida") has committed or participated in the offence.

20/ Constitution of Honduras, article 92: No detention order ("auto de prisión") may be issued without full evidence that a crime or offence has been committed which is subject to a custodial penalty, and without a rational indication of who the author thereof might be.

Article 93: Even when a detention order has been pronounced, no person may be taken to prison or detained ("detenida") therein, if that person offers sufficient security, in accordance with the law.

21/ Constitution of Mexico, article 18: Pre-trial detention may only be ordered for an offence requiring a physical penalty. The place of detention shall not be the same as that intended for the enforcement of sentences and the two shall be completely separate.

Article 19: No detention may exceed a period of three days, without justification in the form of a pre-trial detention order ("auto de formal prisión"), containing: the offence which is attributed to the accused ...

22/ Constitution of Nicaragua, article 33: No person may be subjected to arbitrary arrest or imprisonment ("detención o prisión arbitraria"), or deprived of his liberty, except in cases determined by the law and in accordance with legal procedures ... (5) The competent bodies shall ensure that persons awaiting trial ("procesados") and those already convicted should be imprisoned ("prisión") in different centres.

23/ Constitution of Paraguay, article 19: Pre-trial detention ("Prisión preventiva"). Pre-trial detention shall be ordered only if this is indispensable in the proceedings.

24/ Portuguese Constitution, article 27: (On the right to liberty and safety.) (3) An exception to this principle is deprivation of liberty, for such time and in such conditions as the law establishes, in the following cases:

(a) Preventive detention ("Prisión preventiva") in the event of flagrante delicto or if there is strong evidence that a wilful wrong has been committed ...

(b) Imprisonment ("Prisión") or detention of a person who has entered or is staying illegally on the national territory or against whom extradition or expulsion procedures have been undertaken;

(c) (44) Disciplinary imprisonment ("Prisión") imposed on military personnel, subject to a guarantee of appeal before the competent court.

25/ Constitution of the Dominican Republic, article 8 (b): No person may be imprisoned ("Prisión") nor restricted in his freedom without a written, founded order by a competent judicial official, except in the case of flagrante delicto ... (e) Any detention ("arresto") shall remain without effect or shall be raised to imprisonment ("se elevará a prisión") within 48 hours of the arrested person having been brought before the judicial authority ...

26/ Constitution of Uruguay, article 15: No person may be detained ("preso") except in the event of flagrante delicto or if there is sufficient evidence thereof, by written order of a competent judge.

Article 17: In the event of unlawful detention ("prisión"), the person concerned or any other person may bring a plea of Habeas Corpus before the competent judge ...

27/ Constitution of Venezuela, article 60: Personal liberty and security are inviolable, so that: (1) No person may be arrested ("preso") or detained ("detenido"), unless he has been caught in flagrante delicto, except by virtue of a written order by the official authorized to pronounce detention ...

28/ Cuban Law of Criminal Procedure. The expressions "prisión" (imprisonment), "elevar a prisión" (raise to imprisonment), "auto de prisión" (detention order), "prisión provisional" (provisional or pre-trial detention), "prisión del detenido" (imprisonment of the detainee), and "preso" (prisoner) appear in the following articles, all referring to unconvicted persons:

154. Whoever detains another person shall take the necessary precautions to prevent the detainee suffering any alteration to his person or clothing which might impede recognition. Similar precautions should be taken by the directors of establishments intended for pre-trial detention ("prisión provisional"), who should moreover keep the clothes worn by the prisoners ("presos") or detainees upon admission.

243. The police authority or officer has the obligation to detain: (1) Any person who finds himself in any of the situations described in

the foregoing article; who has escaped having been detained or in pre-trial detention ("prisión provisional"); or who resists a detention order,

245. The police may not keep a person detained for more than 24 hours without reporting to the investigating judge ("Instructor"), who within the following 72 hours shall either release the person or make him available to the Procurator ("Fiscal").

The Procurator shall either raise the order to imprisonment, render the detention without effect or shall replace the order with a precautionary measure ...

If the Procurator orders provisional detention ("prisión provisional") or imposes any other precautionary measure ...

249. From the time an order for provisional detention is pronounced or confirmed by the court ...

In the decision ordering provisional detention for the accused, the following provision ...

250. Provisional detention or any other precautionary measure may only be maintained so long as the reasons which gave rise to it remain valid.

Similarly, reference may be made to articles 251, 252, 255, 374, 467.2, 469, 471, 475, 487.

29/ Penalizes the leader of any attempt to organize an uprising of armed persons against the constitutional powers of the State.

Annex I

REVISED METHODS OF WORK

1. The methods of work take due account of the specific features of the terms of reference of the Working Group on Arbitrary Detention under Commission on Human Rights resolution 1991/42, whereby it has the duty of informing the Commission by means of a comprehensive report (para. 5), and also of "investigating cases" (para. 2).

2. The Group takes the view that such investigation should be of an adversarial nature so as to assist it in obtaining the cooperation of the State concerned.

3. In the opinion of the Working Group, situations of arbitrary detention, in the sense of paragraph 2 of resolution 1991/42, are those described in accordance with the principles set out in annex I of document E/CN.4/1992/20.

4. In the light of resolution 1991/42, the Working Group shall deem admissible communications received from the concerned individuals themselves or their families. Such communications may also be transmitted to the Working Group by representatives of the above-mentioned individuals as well as by Governments and intergovernmental and non-governmental organizations.

5. The communications must be submitted in writing and addressed to the secretariat giving the family name, first name and address of the sender, and (optionally) his telephone, telex and telefax numbers.

6. As far as possible, each case shall form the subject of a presentation indicating family name, first name and any other information making it possible to identify the person detained and all elements clarifying the legal status of the person concerned, particularly:

(a) The date and place of the arrest or detention and the forces presumed to have carried them out, together with all other information shedding light on the circumstances in which the person was arrested or detained;

(b) The reasons given by the authorities for the arrest or detention;

(c) The relevant legislation applied to the case in point;

(d) The internal steps taken, including domestic remedies, especially approaches to the administrative and legal authorities, particularly for verification of the detention and, as appropriate, their results or the reasons why such steps were ineffective or were not taken; and

(e) A short account of the reasons why the deprivation of liberty is regarded as arbitrary.

7. In order to facilitate the Group's work, it is hoped that communications will be submitted taking into account the model questionnaire.

8. Failure to comply with all formalities set forth in paragraphs 6 and 7 shall not directly or indirectly result in the inadmissibility of the communication.

9. The cases notified shall be brought to the attention of the Government concerned by the Chairman of the Group or, if he is not available, by the Vice-Chairman, by means of a letter transmitted through the Permanent Representative to the United Nations asking the Government to reply after having carried out the appropriate inquiries so as to provide the Group with the fullest possible information.

10. The communication shall be transmitted with an indication of the deadline established for receipt of a reply. The deadline may not exceed 90 days. If the reply has not been received by the time the deadline is reached, the Working Group may, on the basis of all data compiled, take a decision.

11. The procedure known as "urgent action" may be resorted to:

(a) In cases in which there are sufficiently reliable allegations that a person is being detained arbitrarily and that the continuation of the detention constitutes a serious danger to that person's health or even life. In such cases, between the sessions of the Working Group, the Working Group authorizes its Chairman or, in his absence, the Vice-Chairman, to transmit the communication by the most rapid means to the Minister for Foreign Affairs of the country concerned, stating that this urgent action in no way prejudges the Working Group's final assessment of whether the detention is arbitrary or not;

(b) In other cases, where the detention may not constitute a danger to a person's health or life, but where the particular circumstances of the situation warrant urgent action. In such cases, between the sessions of the Working Group, the Chairman or the Vice-Chairman, in consultation with two other members of the Working Group, may also decide to transmit the communication by the most rapid means to the Minister for Foreign Affairs of the country concerned.

However, during sessions, it devolves on the Working Group to take a decision whether to resort to the urgent action procedure.

12. Between the sessions of the Working Group, the Chairman may, either personally or by delegating any of the members of the Group, request an interview with the Permanent Representative to the United Nations of the country in question in order to facilitate mutual cooperation.

13. Any information supplied by the Government concerned on specific cases shall be transmitted to the sources from which the communications were received, with a request for comments on the subject or additional information.

14.1 In the light of the information examined during its investigation, the Working Group may take one of the following decisions:

(a) If the person has been released, for whatever reason, since the Working Group took up the case, it shall decide in principle to file the case; it reserves the right, however, to decide on a case-by-case basis whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned;

(b) If the Working Group considers that the case is not one of arbitrary detention, it shall so decide;

(c) If the Working Group considers that further information is required from the Government or source, it may decide to keep the case pending until that information is received;

(d) If the Working Group considers that it is unable to obtain enough information on the case, it shall decide to file the case;

(e) If the Working Group decides that the arbitrary nature of the detention is established, it shall so decide and make recommendations to the Government concerned. The decisions and recommendations shall also be transmitted three weeks after their transmittal to the Government to the source from which the case was originally received, and be brought to the attention of the Commission on Human Rights in the annual report of the Working Group to the Commission.

14.2 Very exceptionally, the Group may, at the request of the Government concerned or the source, reconsider its decisions on the following conditions:

(a) If the facts on which the request is based are considered by the Group to be entirely new and such as to have caused the Group to alter its decision had it been aware of them;

(b) If the facts had not been known or had not been accessible to the party originating the request;

(c) In a case where the request comes from a Government, on condition that the latter has replied within 90 days as stipulated in paragraph 10 above.

15. When the case under consideration concerns a country of which one of the members of the Working Group is a national, that member shall not participate in the discussion owing to the possibility of a conflict of interest.

16. The Working Group shall not deal with situations of international armed conflict, in so far as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence.

17. In accordance with the provisions of paragraph 4 of resolution 1993/36, the Working Group may, on its own initiative, take up cases which, in the

opinion of any one of its members, might constitute arbitrary detention. If the Working Group is in session, the decision to communicate the case to the Government concerned shall be taken at that session. Outside the session, the Chairman, or in his absence the Vice-Chairman, may decide on transmittal of the case to the Government, provided at least three members of the Working Group so agree. When acting on its own initiative, the Working Group shall give preferential consideration to the thematic or geographical subjects to which the Commission on Human Rights has requested it to pay special attention.

18. The Working Group shall also communicate any decision it adopts to the Commission on Human Rights, whether thematic or country-oriented, or to the body set up by an appropriate treaty for the purpose of proper coordination between all organs of the system.

Annex II

STATISTICS

(Covering the period from January to December 1996. The figures given in parentheses are the corresponding figures from last year's report.)

A. Cases of detention in which the Working Group adopted a decision regarding their arbitrary or not arbitrary character

1. Cases of detention declared arbitrary

	Female	Male	Total
Cases of detention declared arbitrary falling within category I	3(-)	34(7)	37(7)
Cases of detention declared arbitrary falling within category II (including two cases of persons (male) who were released)	5(23)	54(89)	59(112)
Cases of detention declared arbitrary falling within category III	-(4)	23(574)	23(578)
Cases of detention declared arbitrary falling within categories II and III	4(-)	56(-)	60(-)
Total number of cases of detention declared arbitrary	12(27)	167(670)	179(697)

2. Cases of detention declared not arbitrary

Female	Male	Total
2(-)	4(4)	6(4)

B. Cases which the Working Group decided to file

	Female	Male	Total
Cases filed because the person was released, or was not detained	3(9)	60(50)	63(59)
Cases filed because of insufficient information	-(-)	-(1)	-(1)

C. Cases pending

	Female	Male	Total
Cases which the Working Group decided to keep pending for further information	4(2)	17(8)	21(10)
Cases transmitted to Governments on which the Working Group has not yet taken a decision	8(23)	137(208)	145(231)
Total number of cases dealt with by the Working Group during the period January to December 1996	29(61)	385(941)	414(102)